

RICHARDSON and others v. DAY and others.

(Circuit Court, N. D. Illinois. February 16, 1885.)

INSOLVENCY — ILLINOIS STATUTE — FRAUDULENT PREFERENCE — ACTION TO SET ASIDE.

No suit can be brought against the assignee of an insolvent, and a creditor to whom he has made a conveyance in fraud of his other creditors, until a demand has been made upon the assignee to sue, and he has refused so to do.

In Equity.

Flower, Remy & Gregory, for complainants.

S. D. Puterbaugh and H. B. Hopkins, for defendants.

GRESHAM, J. The demurrer to the bill in this case was argued last Monday. Day Bros. & Co. were wholesale and retail dry-goods merchants at Peoria, Illinois. On the twenty-eighth of September, 1884, this firm was indebted to the defendant Charles B. Day, late a member of the firm, and a brother of one of the partners of the firm, in the sum of \$200,000, and he was liable on the firm's paper for \$500,000 more. On this date the firm transferred to Charles B. Day its entire stock of goods, worth \$300,000, in discharge of the amount due him, and to secure him against loss on account of his liability upon the firm's paper. Charles B. Day at once took possession of the property transferred to him by bill of sale, which was the entire stock of goods, and the firm at once suspended and ceased to do business. On the ninth day of October following, the insolvent firm made an assignment of their remaining property, under the statute of Illinois, to the defendants Jack and Puterbaugh, for the benefit of the rest of their creditors. The transfer to C. B. Day included the entire assets of the firm, except some bills receivable, the face value of which was \$40,000, but the actual value of which was less than \$20,000. The bill avers that in order to evade the statute of Illinois governing assignments by insolvent debtors, and prohibiting preferences, it was agreed between the firm and Charles B. Day that the former should, by a bill of sale, transfer to the latter their entire stock of goods by way of preference over the other creditors.

The bill also alleges that Jack and Puterbaugh, the assignees, have neglected to take any measures for the recovery of the property transferred to C. B. Day, and that they do not intend to impeach the transaction between him and the assignors. The complainants, who have a claim against the insolvent estate amounting to \$7,700, bring the suit to recover the property transferred to C. B. Day, and have the proceeds thereof equally divided among all the creditors.

If it was true that the insolvent firm had determined to make an assignment under the state law, and that C. B. Day knew of the insolvency and of this disposition, and, for the purpose of evading the provisions of the law and preferring C. B. Day, it was agreed that the transfer should be made to him first in pretended payment of his debt,

and that a formal assignment should be made subsequently, such a palpable evasion of the statute might not be sustained. But that question is not presented for decision. It is clear that no suit can be brought by the creditors against the assignees and Day until a demand has been made upon the assignees to sue, and they have refused to do so. The bill does not allege that before this suit was brought the creditors requested the assignees to sue, and they refused to comply. The assignees are the proper parties to bring all suits to recover property belonging to the estate.

Without expressing an opinion upon any of the other questions presented by the demurrer, it was sustained solely on the ground that the suit was brought by a creditor without a demand being first made upon the assignees to bring the suit.

BROWN v. FISK.¹

(Circuit Court, E. D. Missouri. March 20, 1885.)

1. JURISDICTION—LIABILITY OF STOCKHOLDERS—REV. ST. MO. §§ 736, 745.

A creditor who recovers judgment in a state court against a corporation cannot, under the Missouri Statutes, while the corporation remains undissolved, maintain an action at law in this court against a stockholder in the corporation to recover an amount due from him on unpaid stock.

2. SAME—EQUITY.

In the absence of any statutory proceedings such matters are only cognizable in equity.

Demurrer to Petition.

Fred. T. Ledergerber, for plaintiff.

Geo. D. Reynolds, for defendant.

TREAT, J., (*orally*.) This is an action brought by a judgment creditor of a railroad corporation against the defendant, as a stockholder, for the amount due from him on unpaid stock. The original judgment was had in the circuit court of Cape Girardeau county. This suit is an independent action brought by the judgment creditor against this stockholder in the St. Louis circuit court,—an ordinary action at law. Matters of this nature are cognizable in equity, and only in equity, unless there is some statutory proceeding with respect thereto. That has been fully determined, notably in a case in 106 U. S. *Patterson v. Lynde*, 106 U. S. 519; S. C. 1 Sup. Ct. Rep. 432.

Now, the Missouri statute has two provisions:

(1) Execution having been returned *nulla bona*, to cite in a stockholder and award what is in the nature of a judgment, that is a new execution against him for the portion of the stock unpaid. But that must be done in the court where the original judgment was rendered. (2) There is another provision

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.